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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 698

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**REPLY OF THE CHLORINE INSTITUTE, INC. TO
ESTABLISHMENT OF THE TOXIC BY INHALATION HAZARD
COMMON CARRIER TRANSPORTATION ADVISORY COMMITTEE**

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Dated: September 24, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**Establishment of the Toxic by Inhalation Hazard
Common Carrier Transportation Advisory Committee**

**Initial Comments of
The Chlorine Institute, Inc.**

Preliminary Statement

The members of the Chlorine Institute, Inc., ("the Institute") ship virtually 100 percent of the chlorine shipped by rail in the United States, which equates to approximately 40 percent of all toxic inhalation hazard ("TIH") rail shipments. Accordingly, the Institute has a very substantial and very real interest in the subject matter of this proceeding. The Institute welcomes the opportunity to work with the Board and other stakeholders to address and resolve perceived and potential impediments to TIH rail shipment. Institute members want to actively engage with the Board so that the Board can make informed and appropriate decisions related to the shipment of TIH materials. At the same time, the Institute has serious antitrust concerns regarding the proposed methodology and structure of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee ("TIHCCTAC").

The Institute believes that the antitrust issues must be resolved before the TIHCCTAC can move forward. Institute members want clear confirmation from the

Department of Justice as to if and how members can proceed with this process. Once those issues are resolved, potential participants will be able to freely discuss the issues related to the common carrier obligation which the Board has raised as concerns.

The Antitrust Laws

It is well settled that the antitrust laws forbid competitors from agreeing to establish prices or conditions of purchase or sale. Thus, the prospect of competing chlorine producers and shippers agreeing as to what prices they should pay for the ability to ship chlorine or other TIH materials by rail is not an attractive one. Similarly, how much insurance should be required and/or whether the shipper should indemnify the carrier for toxic releases is also not properly subject to collective action by the competing shippers. The Board does not have the power to affect those legal restrictions without action by the Department of Justice and/or Congress.

It must also be noted that the great majority of TIH shipments initiated by Institute members are made by a very few number of firms, but there are other smaller firms in the market. It seems inevitable given the proposed structure and voting requirements of the TIHCCTAC that some firms will be excluded from the process or treated less favorably than others participating in the process, or at least that may be the perception of some.

It is clearly the province of the Department of Justice and/or the Federal Trade Commission to review the Board's suggested procedures and comment as to their impact, if any, on the antitrust laws and competition policy of the United States. Thus, the Institute strongly suggests that this proceeding be held in abeyance until such comments

can be obtained and reviewed by the Board and the potential participants of the TIHCCTAC.

Liability and the Common Carrier Obligation

The scope of the reported problem of potential railroad liability in handling TIH materials has not been defined. While the Institute seeks to work with the Board and others to address problems in transportation, the hypothetical “ruinous liability” has not been demonstrated. Furthermore, railroad insurance and liability costs have decreased over the last several years. As the Board states, this is an important economic issue impacting the shipment of TIH materials and as such, this liability aspect cannot be separated from the other aspects of the economics of shipping TIH materials. Liability, freight rates, and all other economic aspects of shipping TIH materials must be considered in their entirety and cannot be meaningfully evaluated in isolation. However, Institute members are in support of and will provide the necessary resources for the TIHCCTAC to address the various perceived and potential issues; however, the basic foundation must be that the railroads will continue to transport TIH materials.

There is very serious doubt that the Board can lawfully modify the common carrier obligation with its long and uninterrupted history. Congress has reenacted and revised the Interstate Commerce Act, the Staggers Rail Act and the ICC Termination Act without seriously considering modifying the common carrier obligation. If dramatic changes are to be made in the common carrier obligation, it would seem that it is up to the Congress to do so. The proposed advisory committee and the Board would in this

case only have the authority to recommend legislative action and could not on its own redefine the common carrier obligation.

Committee Structure

With an understanding of the need to resolve the antitrust uncertainty before beginning the process and recognizing the need to maintain the ability to ship TIH chemicals by rail we offer comments on the structure of the proposed committee. The structure of the committee is critical to its effectiveness. We propose the committee be comprised of two Co-Chairpersons (one Shipper and one Railroad representative); eight representatives from the Railroads; eight representatives from Shippers; two General Counsel (one selected by Shippers and one by Railroads); two Economists (one selected by Shippers and one by Railroads); two representatives from Insurance; two representatives from Tank Car Builders/Lessors; and one TIH customer.

As the Board proposed, each member will receive one vote. The majority vote of the Railroad interests and majority vote of the Shipping interests is required to recommend any final proposals. However, we question if railcar manufacturers, insurers, etc. should have a vote. Although, their input is very important, we propose that voting rights be granted only to the representatives of the Rail and Shippers.

Conclusion

In view of the foregoing, the Institute believes that the Board should delay formation of the TIHCCTAC until the Department of Justice and/or the Federal Trade Commission expresses its opinion as to the antitrust implications of the committee. Only

then, assuming that the antitrust issues are resolved and the shippers are granted formal immunity and authorization to participate, can the prospective participants join in the TIHCCTAC process without fear of liability or prosecution. We believe the comments on the structure noted previously better supports the TIHCCTAC process as it moves forward.

Respectfully submitted,

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